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In The

# Supreme Court of the United States

October Term, 1985

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FIRST FIDELITY BANCORPORATION AND FIRST FIDELITY BANK, NATIONAL ASSOCIATION, SOUTH JERSEY,

*Petitioners,*

v.

MARY LITTLE PARELL, Commissioner of Banking of the State of New Jersey, et al.,

*Respondents.*

—o—

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

—o—

## BRIEF IN OPPOSITION

—o—

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether a defense of federal preemption to a state court action seeking an interpretation of New Jersey's Bank Holding Company Act is sufficient to vest jurisdiction over the matter in the federal district court, in light of the authority granted to states in the Federal Bank Holding Company Act to regulate the activities of bank holding companies?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED ..... i

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1

COUNTERSTATEMENT OF FACTS ..... 2

ARGUMENT:

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE CAUSE OF ACTION ALLEGED PATENTLY IS DERIVED FROM STATE LAW AND A DEFENSE OF FEDERAL PREEXEMPTION IS INSUFFICIENT TO SUPPORT REMOVAL TO FEDERAL COURT. 8

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT. 12

CONCLUSION ..... 15

# TABLE OF AUTHORITIES

Page

CASES CITED

Anderson National Bank v. Luckett, 321 U.S. 233 (1944) ..... 9

Commercial National Bank of Little Rock v. Board of Governors, 451 F.2d 86 (8th Cir. 1971) ..... 11

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) ..... 8, 9

Girard Bank v. Board of Governors of Federal Reserve, 748 F.2d 838 (3d Cir. 1984) ..... 6, 11

Mercantile Texas Corp. v. Board of Governors, 638 F.2d 1255 (5th Cir. 1981) ..... 13

National State Bank, Elizabeth, N.J. v. Long, 630 F.2d 981 (3d Cir. 1980) ..... 9

Security National Bank, Etc. v. First West Virginia Bancorporation, 277 S.E.2d 613 (W. Va. 1981), appeal dismissed for want of substantive federal question, 454 U.S. 1131 (1982) ..... 11

United Jersey Banks v. Parell, 783 F.2d 360 (3d Cir. 1986) ..... 6

U.S. v. Citizens National Bank, 422 U.S. 86 (1975) ..... 11

U.S. v. Marine Bancorporation, 418 U.S. 602 (1974) ..... 11

Whitney National Bank v. Bank of New Orleans, 379 U.S. 411 (1965) ..... 10

STATUTES CITED

New Jersey L. 1986, c. 4 ..... 4

N.J.S.A. 17:9A-148B ..... 5

N.J.S.A. 17:9A-344, et seq. ..... 3, 4

## TABLE OF AUTHORITIES—Continued

Page

N.J.S.A. 17:9A-345(a) ..... 1, 4, 7
N.J.S.A. 17:9A-347 ..... 2, 4, 7, 15
N.J.S.A. 56:9-1 ..... 3, 4
12 U.S.C. § 36(c) ..... 9
12 U.S.C. § 1828(c) ..... 3
12 U.S.C. § 1828(c)(5) ..... 14
12 U.S.C. § 1828(c)(7)(B) ..... 14
12 U.S.C. § 1841, et seq. ..... 10
12 U.S.C. § 1842(c) ..... 14
12 U.S.C. § 1846 ..... 1, 10, 13

### Rule Cited

Sup. Ct. R. 17.1 ..... 12

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## BRIEF IN OPPOSITION

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*The Bank Holding Company Act of 1956, 12 U.S.C. § 1846.*

> The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

*N.J.S.A.* § *17:9A-345(a) (1985)* amended by New Jersey *L.* 1986, *c.* 4).

> Except as otherwise provided by sections 3 and 4 of this act, (a) No company which owns more than 25% of the stock of any bank located inside this State shall acquire ownership of more than 10% of the stock of another bank located inside this State if, at the time of such acquisition, or if, as a result of such acquisition, the company owns, or would own, more than 10% of the stock of each of two or more banks located inside this State, whose aggregate average deposits exceed 20% of the aggregate average deposits of all banks other than savings banks transacting business in this State as of the two call dates for which published figures are available next proceeding such acquisition.

*N.J.S.A.* § *17:9A-347 (1985)* (repealed by New Jersey *L.* 1986, *c.* 4).

> Nothing in this act shall prohibit a company from acquiring bank stock in excess of the limitation imposed by section 2 of this act, if such acquisition results from an exchange of stock resulting from the merger or consolidation of a bank with another bank or banks.

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## COUNTERSTATEMENT OF THE CASE

This matter is before the Court on the petition of First Fidelity Bancorporation and First Fidelity Bank, National Association, South Jersey, for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the judgment entered by that court on February 14, 1986.

The matter regards a complaint filed May 14, 1985 in the Superior Court of New Jersey, Chancery Division, by

a group of New Jersey bank holding companies and their affiliated banks (hereafter "UJB"). The complaint concerned alleged violations of the New Jersey Bank Holding Company Act, *N.J.S.A.* 17:9A-344 *et seq.* (the "BHCA") as well as the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1 *et seq.*

The transaction which was the subject matter of the complaint was the then proposed acquisition by First Fidelity Bancorporation ("First Fidelity"), a New Jersey bank holding company, of the National Bank and Trust of Gloucester County ("Gloucester Bank"), a national banking association, by a merger with and into First Fidelity Bank, N.A., South Jersey ("FFBSJ"), one of First Fidelity's national bank subsidiaries. The transaction was structured as a merger between the two nationally chartered banks and approval was therefore sought for the transaction from the United States Comptroller of the Currency pursuant to his authority in the Bank Merger Act of 1966, 12 *U.S.C.* § 1828(c) (the "Bank Merger Act").

UJB entered objections to the application before the Comptroller. In addition, UJB petitioned the New Jersey Banking Commissioner, Parell, to conduct a hearing to determine whether or not First Fidelity's acquisition of Gloucester Bank would be in the public interest and, if she found that it was not, to take appropriate measures to prevent it. UJB also filed a complaint in the New Jersey Superior Court, Chancery Division, in which it sought to have the acquisition enjoined as being violative of state law.

The essence of UJB's complaint was that the acquisition of Gloucester Bank by First Fidelity, even if accom-

plished by a merger between two national banks, would violate both the New Jersey BHCA, *N.J.S.A.* 17:9A-344 *et seq.*, and the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1 *et seq.* While UJB apparently conceded that the merger transaction itself (involving FFBSJ and Gloucester Bank) was a matter solely for review by the Comptroller, it argued that the resulting acquisition of Gloucester Bank by First Fidelity must additionally have satisfied the demands of New Jersey law governing bank holding company acquisitions, particularly, that it not result in the holding company controlling banks which collectively own more than 20% of statewide commercial bank deposits. *See N.J.S.A.* 17:9A-345(a).* The complaint stated that, following consummation of the subject merger, First Fidelity's bank holdings would exceed this "20% limitation."

The complaint cited another section of the BHCA which contained an express exemption from the "20% limitation" for "acquisition[s of bank stock] result[ing] from an exchange of stock resulting from the merger or consolidation of a bank with another bank or banks." *N.J.S.A.* 17:9A-347.** UJB, while acknowledging both the exemption's existence and its applicability to the transaction, sought to avoid its effect by urging the state court to declare it to have been repealed by implication.

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* *N.J.S.A.* 17:9A-345(a) was amended by New Jersey *L.* 1986, c. 4, § 3 on March 28, 1986. References in this brief to *N.J.S.A.* 17:9A-345(a) refer to that section as it existed immediately prior to that amendment and at the time UJB's complaint was filed.

** *N.J.S.A.* 17:9A-347 was repealed by New Jersey *L.* 1986, c. 4, § 10 on March 28, 1986. References in this brief to *N.J.S.A.* 17:9A-347 refer to that section as it existed immediately prior to that amendment and at the time UJB's complaint was filed.

On June 3, 1985, the bank defendants* removed the action to federal court and moved to dismiss for failure to state a cause of action. In support of the removal, they asserted that the complaint, which sought to block a merger between two national banks, raised questions only of federal rather than state law. The fact that by virtue of the bank merger First Fidelity, the holding company, would be acquiring Gloucester Bank was not seen by the bank defendants as raising a cognizable state law issue. UJB cross moved to remand the matter to state court. Defendant Parell, agreeing with UJB that the matter should not have been removed to federal court, joined in its motion to remand. Believing also, however, that UJB's complaint lacked merit, Parell joined with the bank defendants, to that extent only, in urging dismissal.

Following oral argument on the motion, Judge Barry, on July 31, 1985, rendered an oral opinion in which she denied UJB's motion to remand and granted the bank defendants' motion to dismiss. She did so based on her characterization of the transaction solely as a merger between two national banks. However, state banking law grants to the New Jersey Banking Commissioner no authority to review or approve bank mergers in which the resulting bank is a national bank and, in fact, expressly defers to the Comptroller all jurisdiction to review or approve a proposed merger of a state bank into a national bank. *See N.J.S.A.* 17:9A-148B. Judge Barry therefore concluded that this was not a case concerning a defense of

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* First Fidelity, FFBSJ and Gloucester Bank will be collectively referred to hereafter as the "bank defendants."

federal preemption, insufficient to warrant removal, but a situation in which the plaintiff's claim was exclusively governed by federal law so that the plaintiff was necessarily stating a federal cause of action. Therefore, federal jurisdiction existed and removal had been proper. Furthermore, since the Comptroller had not at that time approved the merger, a challenge to the merger on federal antitrust grounds was premature. Dismissal was ordered.

A notice of appeal was filed by UJB on August 1, 1985. While the appeal was pending, on August 29, 1985 the Comptroller approved the merger. On September 28, 1985, following passage of the 30-day waiting period prescribed by the Bank Merger Act, the merger was consummated.

The appeal was argued on November 18, 1985. On February 14, 1986 the Court of Appeals for the Third Circuit reversed the decision of the district court and ordered the case remanded to the New Jersey Superior Court. *United Jersey Banks v. Parell*, 783 *F.*2d 360 (3d Cir. 1986). In her opinion, Judge Sloviter set forth the determination of the court that a transaction such as the one in issue could have attributes of both a merger and an acquisition, that based on a prior decision of the third circuit a New Jersey court could find that the essence of the transaction is an acquisition,* and that federal law does not completely displace state law in the area of bank holding company acquisitions. To the contrary, since federal law specifically preserves state law with respect to the regulation of

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* *See Girard Bank v. Board of Governors of Federal Reserve*, 748 *F.*2d 838 (3rd Cir. 1984).

bank holding companies, the New Jersey BHCA could apply to the transaction. 783 *F.*2d at 369. The court concluded that the cause of action does not require resolution of a substantial question of federal law in dispute between the parties, and, in fact, "the cause of action alleged patently is derived from state law." 783 *F.*2d at 367.

Rehearing and Rehearing En Banc were denied on March 11, 1986. On March 28, 1986, the passage of New Jersey *L.* 1986, *c.* 4 amended the BHCA to effectively raise the percentage limitation on the aggregate average deposits which may be controlled by a holding company in New Jersey.* The limit is to be increased twice over a three and one-half year period. The amended BHCA contains a sunset provision which may possibly affect the complete elimination of limitations on deposits after that time. Moreover, the amended BHCA repeals *N.J.S.A.* 17:9A-347, which had contained the challenged exception to the 20% limitation on statewide deposits for institutions which were acquired by merger. Finally, it amended *N.J.S.A.* 17:9A-345(a) to leave no room for doubt that a holding company may not control deposits which it acquires as the result of a merger subject to approval by the

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* New Jersey *L.* 1986, *c.* 4 amends *N.J.S.A.* 17:9A-345 to provide that a holding company may control 12% of the aggregate average deposits in all depository institutions for the first year following enactment of the act, 13% for the second year following enactment and 13.5% for the third year and the first half of the fourth year following the effective date. However, while previously only commercial bank deposits were included in the base for calculating the limitation, the amendment provides for the inclusion of both commercial bank and thrift institution deposits in the base, effectively allowing a company to control a larger amount of deposits under the amended "20% limitation" than it could before the amendment.

Comptroller, if those deposits are in excess of the percentage limitation in effect at the time.

On April 17, 1986, the bank defendants filed the within petition for a writ of certiorari, a copy of which was received by respondent Parell on April 23, 1986.

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## ARGUMENT

### I. THE PETITION FOR A WRIT OF CERTRIOARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE CAUSE OF ACTION ALLEGED PATENTLY IS DERIVED FROM STATE LAW AND A DEFENSE OF FEDERAL PREEMPTION IS INSUFFICIENT TO SUPPORT REMOVAL TO FEDERAL COURT.

The court of appeals found that "the cause of action alleged (in UJB's complaint) patently is derived from state law." 783 *F.*2d at 367. Using the principles expressed by this Court in *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 *U.S.* 1 (1983), the court concluded that federal jurisdiction does not exist and the case should be remanded to state court. The general rule expressed in *Franchise Tax Board* regarding removal of cases to federal court based on federal preemption of state law is that a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case arises under federal law. 463 *U.S.* at 10. The claim presented in UJB's complaint is that the transaction at issue, the acquisition of Gloucester

Bank by First Fidelity, is prohibited by the New Jersey BHCA. To prove its case, UJB is obliged to convince the court that its interpretation of the New Jersey BHCA is correct. Therefore, the action belongs in state court.

The essence of petitioners' argument is that UJB failed to plead a "necessary" federal question in its complaint and therefore its cause of action arises under federal law. *See Franchise Tax Board,* 463 *U.S.* at 22. Petitioners suggest that the preemptive force of the national banking statutes is so powerful as to completely preempt any state cause of action for violation of state statutes relating to bank holding companies.

It is clear that this is not a situation in which all state law is preempted by federal law so that the "real nature" of the case is federal. To the contrary, regulation of banking has been subject to the dual control of state and federal governments since the passage of the first National Bank Act in 1863. *National State Bank, Elizabeth, N.J. v. Long,* 630 *F.*2d 981, 985 (3rd Cir. 1980). National banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions. *Anderson National Bank v. Luckett,* 321 *U.S.* 233 (1944).

One of the regulatory areas in which Congress has specifically permitted state laws to constrain the activities of national banks concerns the geographical expansion of banks. Congress has, in effect, delegated to the states the authority to determine by law (although it is the task of the federal regulator to apply such laws) whether and to what extent national banks are permitted to branch or to retain branches following a bank merger. *See* 12 *U.S.C.*

§ 36(c) (the "McFadden Act"). National banks are subject to the branching limitations imposed by state law, a policy designed to maintain "competitive equality."

Historically, a bank might attempt to avoid such state-law branching restrictions by organizing a holding company to charter new banks in towns or districts into which the bank was forbidden to branch. *Whitney National Bank v. Bank of New Orleans,* 379 *U.S.* 411 (1965). This resulted in the adoption by many states of bank holding company laws the purpose of which is essentially to carry over into the field of bank holding companies the same state-law restrictions upon expansion that apply to their bank subsidiaries; *i.e.,* if a bank is not permitted to branch under state law, a typical state-bank holding company law would prohibit ownership or acquisition of another bank by the holding company under similar circumstances. (New Jersey's BHCA is such a law). These laws apply to holding companies owning both state and national bank subsidiaries.

The Federal Bank Holding Company Act of 1956, 12 *U.S.C.* § 1841 *et seq.* (the "Federal Bank Holding Company Act"), preserves these state laws regulating bank holding companies. It provides:

> The enactment by the Congress of (the Federal Bank Holding Company Act) shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. [12 *U.S.C.* § 1846.]

The Act expressly permits states to exercise jurisdiction and control over the activities of bank holding companies and their subsidiaries, even subsidiaries which are national

banks. *Commercial National Bank of Little Rock v. Board of Governors,* 451 *F.*2d 86 (8th Cir. 1971); *Security National Bank, Etc. v. First West Virginia Bancorporation,* 277 *S.E.*2d 613 (W. Va. 1981). Rather than preempting state restrictions upon bank holding company expansion, as the bank defendants suggest, federal antitrust laws operate only withir the context of and in tandem with those state restrictions. *See U.S. v. Marine Bancorporation,* 418 *U.S.* 602, 627-630 (1974); *U.S. v. Citizens National Bank,* 422 *U.S.* 86, 118-119 (1975). Since the Federal Bank Holding Company Act permits states to exercise such jurisdiction over the activities of bank holding companies, even to prohibit altogether their formation, it follows that less restrictive prohibitions like the 20% limitation contained in the New Jersey BHCA are also permitted. *See Commercial National Bank of Little Rock,* 451 *F.*2d at 89.

The court of appeals correctly applied the above principles to the transaction at issue in this case. The court relied on *Girard Bank v. Board of Governors of the Federal Reserve System,* 748 *F.*2d 838 (3rd Cir. 1984) for the proposition that a transaction may have attributes of both a merger between two banks and an acquisition of a bank by a bank holding company and thereby be subject to review by more than one agency. The court recognized that while the transaction at issue is a merger of two national banks under the Bank Merger Act which only the Comptroller has jurisdiction to review, it may also be regarded as an acquisition of a bank by a bank holding company and subject to New Jersey statutes regulating acquisition of banks by bank holding companies. Since section 1846 of the Federal Bank Holding Company Act

reserves to the states the *general* authority to "(exercise) such powers and jurisdiction . . . with respect to banks, bank holding companies, and subsidiaries thereof," and since it is the *state* which chooses to exercise this power specifically with respect to acquisitions of bank stock, the question of what constitutes such an acquisition clearly must be decided with reference to state law.

Petitioners imply that the court of appeals relinquished jurisdiction rightfully vested in the federal court by leaving it to the state court to determine whether or not the transaction at issue is actually an acquisition. In light of the role of state law in regulating bank holding companies, and the recognition by the court of appeals that the transaction at issue may be characterized as an acquisition by a bank holding company, it is clear that the court was correct in finding that the state law upon which the complaint is based is not displaced by federal law and that therefore the state claim pleaded was not "really one" of federal law. 783 *F.*2d at 369.

## II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The rules of this Court governing review on writ of certiorari make plain that review will be granted only "when there are special and important reasons therefor." *Sup. Ct. R.* 17.1. In an attempt to exaggerate the importance of its case, the petitioners assert that the decision of the court of appeals conflicts with the decisions

of three other circuits and the express language of the Bank Merger Act. The conflict allegedly arises because the court of appeals disregarded the established federal antitrust standards which, petitioners say, are the exclusive standards against which to test all mergers or acquisitions of banks and upon which all limitations of those transactions must be based. The conclusion which petitioners draw is that since the federal standards are exclusive, the New Jersey BHCA which contains different standards is so displaced by federal law that UJB's claim, based on the New Jersey BHCA, is inherently a federal claim.

However, the three circuit court cases which allegedly conflict with the court of appeals decision are readily distinguishable. Those cases concern the ability of the *federal regulators, e.g.* the Federal Reserve Board and the Comptroller, to test mergers or bank holding company acquisitions against competitive standards which are more stringent than the antitrust standards incorporated into the Federal Bank Holding Company Act and Bank Merger Act. The cases hold that the federal agencies lack discretion to disapprove a transaction without finding a violation of the antitrust standards explicitly incorporated into their statute. *See,* for example, *Mercantile Texas Corp. v. Board of Governors, etc.,* 638 *F.*2d 1255, 1263 (5th Cir. 1981). They simply do not concern the ability of a *state* to legislate additional limitations upon acquisitions by bank holding companies. As discussed above, that ability of states to create such limitations is specifically authorized by the Federal Bank Holding Company Act. *See* 12 *U.S.C.* § 1846.

Likewise, petitioners completely misunderstood the intent and effect of the inclusion of the antitrust standards

in the Bank Merger Act and the Federal Bank Holding Company Act. Again, these statutes provide only that the *Comptroller* or the *Federal Reserve Board* shall not approve a merger or acquisition which would result in a violation of the antitrust standards set forth therein. *See* 12 *U.S.C.* § 1842(c) and 12 *U.S.C.* § 1828(c)(5). Moreover, a court must utilize those uniform federal antitrust standards in any judicial proceeding in which the approval of a merger or acquisition *by those federal agencies* is being reviewed. *See* 12 *U.S.C.* § 1828(c)(7)(B).

Consequently, the allegedly conflicting cases do not address the situation raised by this case and there is no split in the circuits as petitioners urge.

Petitioners have not even attempted to demonstrate any special and important reasons to justify further review on writ of certiorari other than their claim that the decision of the court of appeals was incorrect. To the contrary, because of the peculiar interrelationship of federal and state banking law, the case is unlikely to have application to the question of removal jurisdiction beyond its own unique factual circumstances. Furthermore, the basis for the controversy underlying the original complaint has been substantially eliminated. Upon the consummation of the merger of Gloucester Bank into FFBSJ on September 28, 1985, the transaction sought to be enjoined by UJB's complaint was accomplished. In addition, as a result of the amendment of the New Jersey BHCA, effective March 28, 1986, while a New Jersey court could conclude that the merger had violated the provisions of the BHCA in effect at the time of the merger, that transaction would not violate state law as it exists today. Indeed,

as to all future transactions, the need to resolve the state law issue, whether *N.J.S.A.* 17:9A-347 (the merger exception to the 20% limitation) was repealed by implication, was obviated by the actual repeal of that section!

In conclusion, the decision sought to be reviewed does not present a special or important reason to justify review by this Court on writ of certiorari.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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